

U.S. Department of Labor

**Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002**

**(202) 565-5330
(202) 565-5325 (FAX)**



Date: March 6, 2000

Case No.: **1999 INA 272**

In the Matter of:

GARBIS ASLANYAN dba WESTMINSTER GOLDEN CENTER, Employer,

on behalf of

BERC AGOPOGLU, Alien

Certifying Officer: Hon. R. M. Day, Region IX

Appearance: Eliezer Kapuya, Esq., of Los Angeles, California, for Employer and Alien.

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

ORDER OF REMAND

This case arose from the labor certification application that GARBIS ASLANYAN dba WESTMINSTER GOLDEN CENTER ("Employer") filed on behalf of BERC AGOPOGLU ("Alien"), under § 212(a) (5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at San Francisco, California,, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.¹

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible for labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.²

STATEMENT OF THE CASE

On July 3, 1995, the Employer applied for alien employment certification on behalf of the Alien to fill the position of "Contract Negotiator" in his Shopping Centers Management business. Employer described the Job Duties as follows:

Financial Manager: Will Negotiate and draw contract for a shopping center management company. Will transact all the financial and legal paperwork of a shoppingcenter management company .

AF 17, box 13. (Copied verbatim without change or correction.) The position was classified as an "Contract Administrator" under DOT Occupational Code No. 162.117-014.³ This was a forty hour a week job from 10:00 AM to 6:00 PM, at a salary of \$3,529, per month with no provision for overtime work. AF 17, boxes 10 -12. Employer required completion of college with a Bachelor of Arts degree with either Economics or Business as the Major Field of Study.⁴ The Employer's Form ETA 750 A also required four years of experience in the Job Offered. AF 17, box 14. No Other Special Requirements were specified. *Id.*, box 15. Although twenty-three U. S. workers applied for this position, none of them was hired for the Job Offered. AF 26-28, 50-

²Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Naturalization Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

³162.117-014 **CONTRACT ADMINISTRATOR** (any industry) Directs activities concerned with contracts for purchase or sale of equipment, materials, products, or services: Examines performance requirements, delivery schedules, and estimates of costs of material, equipment, and production to ensure completeness and accuracy. Prepares bids, process specifications, test and progress reports, and other exhibits that may be required. Reviews bids from other firms for conformity to contract requirements and determines acceptable bids. Negotiates contract with customer or bidder. Requests or approves amendments to or extensions of contracts. Advises planning and production departments of contractual rights and obligations. May compile data for preparing estimates. May coordinate work of sales department with production and shipping department to implement fulfillment of contracts. May act as liaison between company and subcontractors. May direct sales program [MANAGER, SALES (any industry) 163.167-018].*GOE: 11.12.04 STRENGTH: S GED: R5 M3 L5 SVP: 8 DLU: 86*

⁴ A national of Turkey, the Alien was born 1973, and earned a bachelor of Arts degree in Economics in 1995. He is seeking work as a Financial Manager. The Alien has no work experience, but bases his qualifications on his academic training in Economics from 1991 to 1995. He is living in the United States under a B-2 visa, which is issued under § 101(a)(15)(B) of the Act, 8 U.S.C. § 1101(a)(15), to permit entry into the United States for either business or pleasure. This class of visa holders includes an alien who has a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure. See 22 CFR §§ 40, 41.

52, and see 47-48, 53-176, 180-183.⁵

Notice of Findings. On October 7, 1998, the Certifying Officer ("CO") issued a Notice of Findings ("NOF"), proposing to deny certification. AF 12-15. The NOF cited 20 CFR §§ 656.21(b)(6) and 656.21(j)(1)(iii) and (iv). Observing that Mr. Dampf, Mr. Medyn, Mr. Dixon, and Mr. Kostecki applied for the position and were rejected, the NOF found that these apparently qualified U. S. workers appeared to have been rejected for reasons that were neither lawful nor job-related. The NOF said,

The employer must explain with specificity the lawful job-related reasons for rejecting each U.S. worker referred to above, and give the job title of the person who considered them for employment. The employer must tell why each applicant named above is not qualified, willing, able, or available for the job opportunity. Inability to contact any or all applicants at this time is not considered rationale for rejection of any U. S. Worker named in this Notice.

AF 14-15.

Rebuttal. The Employer's rebuttal was a statement addressed to the NOF issues, which he filed on October 20, 1998. AF 09-10. The Employer also had discussed the job applications of Mr. Dampf, Mr. Medyn, Mr. Dixon, and Mr. Kostecki in his Recruitment Report of April 28, 1996, to which he now added the further information of his rebuttal statement. AF 50-52.

Final Determination. The CO issued a Final Determination denying certification on March 9, 1999. AF 04-06. Again citing 20 CFR §§ 656.21(b)(6) and 656.21(j)(1)(iii) and (iv), the CO reviewed the Application, the NOF, and the rebuttal. The CO first concluded that Mr. Dixon, Mr. Medyn, and Mr. Kostecki did not meet the minimum job requirements, and the CO dismissed the issues relating to their applications for the Job Offered. Finding that Mr. Dampf was qualified, willing, available and able to meet the minimum job requirements, however, the CO concluded that the Employer had failed to sustain his burden of proving that at the time of Application there were not sufficient workers who were able, willing, qualified, and available at the place where the Alien was to perform the work. Consequently, the CO denied certification.

Appeal. On March 12, 1999, the Employer requested administrative judicial review of the denial of certification. AF 01.

⁵The CO correctly classified the Job Offered. At AF 19 the Employer suggested that the Job Offered by him was "similar to DOT 169.267-038, ESTIMATOR/NEGOTIATOR." After examining this DOT entry, we disagree. The job duties described in the Application clearly related to the work of a Contract Administrator. The negotiations he relied upon were only a minor part of the duties of an Estimator. According to the DOT occupation description, an Estimator's primary function is to prepare estimates of construction costs. The negotiations mentioned in the DOT were directed toward bringing together the interested parties for the purpose of developing a consensus as to the plans, specifications, and functional objectives of the structure contemplated.

DISCUSSION

Employer's job requirements. Notwithstanding the requirements of education and experience in the Employer's Application, its newspaper advertisement stated the requirements of education and experience in the alternative. The advertisement that Employer ran from February 14, 1996 through February 16, 1996, was first approved by the state employment security agency ("state agency") on February 6, 1996.⁶ The advertisement and the posted notice were consistent with the Employer's October 13, 1995, request to amend the hiring qualifications in the alternative. AF 19, 20. Even when these provisions were amended in the record on September 16, 1998, the Employer's Application was restated to eliminate the requirement of training in Economics and to eliminate experience in a Related Occupation. AF 17. As set forth in the appellate File referred to BALCA, the 1998 version of the amendment did not provide that the job seekers could offer either the four years of education or the four years of experience in the alternative. *Id.* Consequently, the advertisement clearly misstated the hiring criteria for the Job Offered.

The Alien. As the Alien clearly has no work experience qualifications whatsoever, the proposed 1995 amendment to the Application was necessary, and on its face the deviation of the Employer's 1996 advertisement from the Application was substantial and material. Compare AF 38-40 with AF 17, box 14. While the Employer may have intended these job requirement to be stated in the alternative, it did not say so in its amended Application, and the Alien remains unqualified for this position. If, on the other hand, the Application was amended to state that the educational and experience requirements were in the alternative, the Panel would consider the applicability of the 1998 holding in **Francis Kellogg, et als.**, 94 INA 465, 94 INA 544, 95 INA 068 (Feb. 2, 1998)(*en banc*).

Summary and conclusion. The CO's NOF and final Determination are inconsistent with the evidence of record in that the analysis of the rejection of job applicants (1) assumed an amendment to the Application that was never approved and completed until two years after the date of the advertisement and (2) assumed an amendment to the Application that was not consistent with the version that was completed in 1998. This file must be remanded to the Certifying Officer to give the Employer an opportunity to amend the Application to state the education and experience requirements in the alternative, and to specify which of alternative requirement is primary. In so doing, the CO must insure compliance with our decision in **Francis Kellogg, supra**. The Employer should then be directed to readvertise the position in accordance with the amended Application and to complete the recruitment process required by the Act and regulations in the manner provided by law. Accordingly, the following order will enter.

ORDER

⁶ As noted above, in 1996, the Employer failed to hire any of the twenty-three U. S. workers who applied for this position. The details of the job applicants' responses will be found at AF 26-28, 50-52, 47-48, 53-176, and 180-183.

1. The Certifying Officer's denial of labor certification is hereby vacated.
2. This file is remanded for action consistent with the foregoing decision and order.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.

